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No. 82-862

In the Supreme Court of the United States

October Term, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

LEE ANN LE STRANGE DARRONE, Administratrix of the Estate of Thomas LeStrange,
Respondent

On Writ Of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Does a private right of action exist under section 504 of the Rehabilitation Act of 1973?

2. In a private action under section 504, may an injured plaintiff recover monetary relief?

3. Does section 504 forbid a recipient of federal assistance to discriminate in employment on the basis of handicap where a primary objective of that assistance is not to provide employment?

4. Under what circumstances does discrimination constitute "exclu[sion] from ... participation in ... deni[al] [of] the

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A complete list of the parties to the proceeding in the court below is contained in the caption of the case in this Court. A listing of all subsidiaries (except wholly owned subsidiaries) and affiliates of Petitioner Consolidated Rail Corporation has been included within the Petition for a Writ of Certiorari, at ii.

benefits of, or ... discrimination under any program or activity receiving Federal financial assistance" within the meaning of section 504?

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STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this case are sections 504 and 505 of the Rehabilitation Act and sections 601 and 604 of Title VI of the 1964 Civil Rights Act. The regulations involved are 49 C.F.R. part 27. Both the statutes and the pertinent regulations are set out in an appendix to this brief.

SUMMARY OF ARGUMENT

I. This Court has held that there is a private right of action under both 601 of the Civil Rights Act of 1964 and section 901 of the Education Amendments of 1972. Guardians Association v. Civil Service Commission, 51 U.S.L.W. 5105 (1983); Cannon v. University of Chicago, 441 U.S. 677 (1979). Since section 504 is substantially identical to sections 601 and 901, Guardians and Cannon compel the conclusion that a similar

right of action exists under section 504.

II.(1) In Guardians Justice O'Connor and four other members of the Court held that compensatory injunctive relief was available for a violation of Title VI. This Court has repeatedly recognized that awards of back pay are within the scope of an equitable decree. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

(2) Plaintiff in this action seeks damages for intentional discrimination on the basis of handicap. The prospect of such awards is necessary to provide an incentive for federal grantees to comply with section 504. Had Congress wanted to prohibit damages under section 504 it would have done so expressly; such an explicit limitation was in fact contained in another portion of the 1978 Rehabilitation Act Amendments.

III. (1) Conrail's practices are subject to 27.31(a)(i) of the Department of Transportation regulations, which forbids discrimination on the basis of handicap in all federally assisted programs, regardless of whether providing employment is a primary objective. Twenty-five other agencies have similar regulations, which stem from an HEW section 504 regulation first promulgated in 1974.

(2) Section 504 prohibits discrimination in the same broad language which this court held applicable to employment in North Haven Board of Education v. Bell, 456 U.S. 512 (1982). The 1973 Senate Report accompanying section 504 expressly referred to the problem of employment discrimination. S. Rep. No. 93-318, 93rd Cong., 1st Sess., p. 4. Senator Williams explained that the 1973 Act contained "prohibitions against discrimination in employment in programs

assisted with federal funds." 119 Cong. Rec. 24588 (1973).

(3) Petitioner relies on a 1974 Senate Report stating that section 504 was "patterned after" section 601 of the 1964 Civil Rights Act. But that report states that section 504 was also patterned after section 901 of the Education Amendments of 1972, which North Haven held generally prohibits discrimination in employment.

(4) In 1978 Congress enacted section 505(a)(2), which provides that "the remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by" a violation of section 504. The accompanying Senate Report explained that this provision was adopted merely to codify that portion of the HEW section 504 regulations which incorporated by reference the Title VI

administrative procedures. S. Rep. No. 95-890, 95th Cong., 2d Sess., 18.

IV. Conrail has received $3.2 billion under the Rail Reorganization Act of 1973. The "program" assisted by these funds includes all activities for which the funds could have been used by Conrail. Salaries of engineers such as LeStrange and other employees are among the purposes for which that federal assistance could be used. Respondent need not prove whether Conrail in fact chose to use federal dollars for the particular position from which Le Strange was excluded, since section 504 is "programspecific", not "job-specific."

ARGUMENT

I. SECTION 504 CREATES A CAUSE OF ACTION ON BEHALF OF HANDICAPPED INDIVIDUALS DISCRIMINATED AGAINST BY FEDERAL GRANTEES

The question of whether section 504

can be enforced through a private action is controlled by this Court's decisions in Cannon v. University of Chicago, 441 U.S. 677 (1979), and Guardians Association v. Civil Service Commission, 51 U.S.L.W. 5105 (1983). Section 504 was expressly patterned after the similar language of section 601 of the Civil Rights Act of 1964 and section 901 of the Education Amendments of 1972. In Cannon this Court held that Title IX creates a private cause of action. In Guardians a majority of the Court[1/] reached a similar conclusion regarding Title VI. This construction of Title VI was well established in the lower courts by 1973 when section 504 was enacted. Cannon v. University of Chicago, 441 U.S. at 696-98. This Court's exhaustive analysis of this issue in Cannon,

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1/ Opinions of Justice White (joined by Justice Rhenquist), Justice Stevens (joined by Justices Brennan, Blackmun, and O'Connor) and Justice Marshall.

and the application there of the standards in Cort v. Ash, 422 U.S. 66 (1975), is largely applicable to the instant case. All eight circuits which have considered this question have held that section 504 creates a private cause of action.[2/]

Petitioner urges this Court to hold that section 504 creates no private right of action because it allegedly establishes no obligations or duties at all on the part of recipients of federal assistance, but is "no more than a statement of policy."

2/ Miener v. State, 673 F.2d 969 (8th Cir.), cert. denied. ___ U.S. ___, 103 S.Ct. 215 (1982); Pushkin v. Regents of the University of Colorado, 659 F.2d 1372 (10th Cir. 1981); Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980); Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980), vacated on other grounds, 451 U.S. 390 (1981); NAACP v. Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979); Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978), rev'd on other grounds, 442 U.S. 397 (1979); Rampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977); Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977).

(Br. 36). If this were correct, it would also preclude action on the part of any federal agency to correct discrimination on the basis of handicap in the federal programs which it administers. Petitioner relies for this surprising conclusion on the following passage in the 1974 Senate report:

> [S]ection [504] ... constitutes the establishment of a broad government policy that programs receiving federal financial assistance shall be operated without discrimination on the basis of handicap. S. Rep. No. 1135, 92nd Cong., 2d Sess., 39.

But the language immediately following the quoted portion of the Senate report makes clear that Congress did intend section 504 to create enforceable obligations:

> It does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended. Id. at 39-40.

The report further explained that Congress

envisioned that section 504 would be implemented in a manner "similar to" Title VI and Title IX.

> This approach to implementation of section 504 ... would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the federal government as well as relative ease of implementation and permit a judicial remedy through a private action. Id. at 40 (emphasis added).

The words "judicial remedy through a private action" must refer to a private right of action, since judicial review of contested agency action is mentioned earlier in the sentence.

Petitioner also urges that Congress cannot have intended to permit private enforcement of section 504 because section 505(a)(2) expressly authorizes resort to Title VI "remedies, procedures and rights"; petitioner argues that these Title VI remedies do not include a private right of action, and that the courts "shall not

expand the coverage of the statute to subsume other remedies." (Br. 34). Since section 504 was adopted in 1973 and section 505(a)(2) was not enacted until 1978, petitioner is urging that section 505(a)(2) was adopted to partially repeal section 504 and to rescind the right of private action that was widely recognized by the lower courts prior to 1978. See n.2, supra.

Such a construction of section 505(a)(2) is precluded by the terms of section 505(b), which provides:

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Both the House[3/] and Senate reports make clear that subsection (b) was adopted to provide counsel fees for handicapped

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3/ H. Rep. No. 95-1149, 95th Cong., 2d Sess., 21 (1978).

individuals who enforced section 504 through private litigation. The Senate report, which is of particular importance since it accompanied section 505(a)(2) as well as 505(b), explained:

> The committee believes that the rights extended under title V, that is ... nondiscrimination under Federal grants -- are, and will remain, in need of constant vigilance to assure compliance, and the availability of attorneys' fees should assist in vindicating private rights of action in ... cases .. arising under section ... 504. 4/

The importance of counsel fees to facilitate private enforcement of section 504 was also stressed on the Senate floor. 5/ Congress would not have provided in subsection (b) for counsel fees in private enforcement actions if such actions were to have

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4/ S. Rep. No. 95-890, 95th Cong., 2d Sess., 10.

5/ 124 Cong. Rec. 30346 (remarks of Sen. Cranston), 37507 (remarks of Sen. Stafford).

been precluded by subsection (a)(2). Petitioner's argument that section 505(a)(2) forbids any private cause of action also necessarily assumes that Congress believed that such lawsuits were not authorized under Title VI. But Senator Cranston, the author of section 505(a)(2) and the floor manager of the 1978 amendments, indicated otherwise in a colloquy with Senator Bayh. 124 Cong. Rec. 30349 (1978).

Had Congress in 1978 abolished the then well established private right of action, it would have left disabled individuals aggrieved by a violation of section 504 no relief other than recourse to the federal agency which had provided the grant involved. But the most consistent theme in the four years of congressional oversight of section 504 which led to the 1978 amendments had been the failure of those

agencies to enforce it vigorously, if at all. See pp. 79-80, 94-96, infra. A Government Accounting Office study concluded that most federal agencies had taken no action to implement section 504.[6/] The Department of Health, Education, and Welfare, the agency primarily responsible for assuring administrative enforcement of section 504, conceded it was unable to do so. In 1975 HEW's Office for Civil Rights reported that it had become "increasingly difficult to adhere to the assurance in substantive regulations of prompt investi-

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6/ Hearings on Review of Programs for the Handicapped, 1977, before the Subcommittee on the Handicapped of the Senate Committee on Human Resources, 95th Cong., 1st Sess., 1130 (1977) (hereinafter cited as "1977 Senate Hearings"); Hearings on Rehabilitation of the Handicapped Programs, 1976, before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess., 322 (1976) (hereinafter cited as "1976 Senate Hearings").

gation of each [discrimination] complaint ...." 40 Fed. Reg. 24148. The next year HEW noted that there had been an "astronomical growth" in the number of complaints it was required to process, and that "these increases have not permitted the office to keep pace with the rising volume of complaints received." 41 Red. Reg. 18394. OCR believed that even with increased staff it would be impossible "simultaneously to eliminate the complaints on a timely basis, and to fulfill other essential enforcement responsibilities." Id. at 18394. In 1977 the OCR director, David Tatel, urged Congress to retain the private right of action under section 504 precisely because the department was simply unable to handle effectively the increasing volume of administrative complaints.[7/] Tatel

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7/ Hearings on Implementation of Section 504, Rehabilitation Act of 1973, before the

noted that while the number of complaints filed under section 504 was accelerating, his office was understaffed, and that a backlog of several thousand unprocessed discrimination charges thus existed.[8/] Representative Jeffords commented that no one "could conceive of" requiring exhaustion of administrative remedies in light of that backlog and the understaffing at OCR.[9/] It is equally inconceivable that Congress, which was all too aware of these problems, could have intended to require aggrieved individuals to resort to this

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7/ continued

Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 1st Sess., p. 358. (1977) (hereinafter cited as "1977 House Hearings").

8/ 1977 House Hearings 341; see also id. at 302-05.

9/ 1977 House Hearings 276.

backlogged and ineffective administrative process instead of, or prior to,[10/] seeking redress in the courts.

II. MONETARY RELIEF MAY BE AWARDED IN PRIVATE ACTIONS TO REDRESS VIOLATIONS OF SECTION 504

In Guardians Association v. Civil Service Commission, 51 U.S.L.W. 5105 (1983), five members of the Court held that compen-

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10/ The section 504 administrative procedures are identical to those under Title IX, which this Court has already held are so limited that it would be inappropriate to insist they be used prior to filing suit. Cannon v. University of Chicago, 441 U.S. at 708-09 n.41. The United States itself opposed any exhaustion requirement in section 504 cases in its amicus brief in Southeastern Community College v. Davis, 442 U.S. 397 (1979).

In the instant case, of course, there were no administrative procedures to exhaust when respondent's claim arose. LeStrange filed this action on September 22, 1978. The Department of Transportation did not issue regulations implementing section 504 until May 31, 1979. See LeStrange v. Consolidated Rail Corp., 501 F. Supp. 964, 969-70 and n.5 (M.D. Pa. 1980).

satory injunctive relief could be awarded to redress a violation of Title VI of the 1964 Civil Rights Act. 51 U.S.L.W. at 5113 (O'Connor, J., concurring), 5114 (Marshall, J., dissenting), 5120 (Stevens, J., dissenting). Four members concluded that damages could be awarded for any illegal discrimination, 51 U.S.L.W. at 5114 (Marshall, J., dissenting), 5120 (Stevens, J., dissenting), and two others indicated such relief might be available to redress an act of intentional discrimination. 51 U.S.L.W. at 5109 (White, J.).

We contend, first, that back pay has traditionally been regarded as an equitable remedy, and that the availability of back pay relief is thus supported by the majority view in Guardians as well as by the legislative history of section 504. Second, we note that the complaint in this action alleges intentional discrimination on the

basis of handicap, and urge the Court to hold that damages may be awarded under section 504 for such intentional discrimination. Because of the nature of those allegations, there is no need to consider in this case whether different considerations might apply to a claim for damages to redress injuries caused by a practice or policy which merely had the effect of discriminating on the basis of disability.

(1) Back Pay

This Court has repeatedly recognized that the district courts "enjoy[] the 'historic power of equity' to award lost wages to workmen unlawfully discriminated against...." Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975). In Mitchell v. DeMario Jewelry, 361 U.S. 288, 292-95 (1960) this Court relied on that power to uphold the authority of the district courts to order back pay for employees

unlawfully dismissed in retaliation for having instituted proceedings under the Fair Labor Standards Act. Albemarle Paper Co. recognized that the authority of the federal courts to award back pay under Title VII of the 1964 Civil Rights Act fell within that equitable power. 422 U.S. at 413-425. Curtis v. Loether, 415 U.S. 189, 197 (1974), noted that Title VII back pay awards were widely regarded as "an integral part of an equitable remedy, a form of restitution".

These decisions recognize that back pay awards fall within the traditional equitable power of the courts because they require a defendant "to disgorge funds wrongfully withheld from the plaintiff". Curtis v. Loether, 415 U.S at 197. An employer which has engaged in unlawful discrimination "cannot be heard to assert that wages are ordered to be paid for

services which were not performed, for it was the employer's own unlawful conduct which deprived the employees of their opportunity to render services." Mitchell v. DeMario Jewelry, 361 U.S at 293. Such awards are also "appropriate and necessary to enforce compliance with" the underlying statute since the prospect of having to provide reimbursement for wages unlawfully withheld provides an incentive to obey the law in the first instance. Porter v. Warner Holding Co., 328 U.S. 395, 400 (1946).

The traditional equitable power to award back pay "is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words ... restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." Porter v. Warner Holding Co.,

328 U.S. 395, 398 (1946). No such restriction can be found in the language of section 504. The legislative history of that provision demonstrates that Congress fully intended to authorize back pay awards in cases of employment discrimination. In 1978 Senator McClure offered an amendment concerning section 501 that would have forbidden in actions alleging employment discrimination by the federal government "equitable relief .. disproportionately exceeding actual damages in the case." 124 Cong. Rec. 30576 (1978). Although Senator McClure emphasized that his proposal "would not in any way limit the actual damages which could be recovered," ibid., his amendment was successfully opposed by the managers of the bill.[11/] Senator Cranston argued that

11/ Section 505(b)(1) allows a court in framing an injunction to consider the cost

federal employees were entitled to the same rights as employees of federal grantees, and added:

> An individual denied a job, an advancement, or promotion on the basis of handicap is a person entitled to the same remedies as a person discriminated against unlawfully on the grounds of any other factor. 124 Cong. Rec. 30578.

The remedies available to victims of discrimination on the basis of other factors--specifically race, national origin, sex and religion--include back pay under Title VII. It is inconceivable that Senator Cranston could have made this argument had he believed that such monetary relief was not available to victims of discrimination on the basis of handicap

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11/ continued

of any workplace accommodation. Senator Cranston correctly described this as merely stating what any "reasonable court" could do even in the absence of an express authorization. 124 Cong. Rec. 30579.

just as it was for victims of other forms of employment discrimination. In 1979, a report of the Senate Committee which had drafted sections 504 and 505 emphasized that:

> It is and always has been the Committee's intent that any handicapped individual aggrieved by a violation of title V has the right under existing law ... to receive back pay. 12/

There is no reason to question the accuracy of the Committee's description of its views of only a year before.

(2) Damages

Should this Court conclude that back pay is not within the equitable power of the federal courts, we would urge that compensatory damages, including damages for lost wages, may be awarded for a violation of section 504.

12/ S. Rep. No. 96-316, 96th Cong., 1st Sess., 12-13 (1979).

The complaint in this section claimed that Conrail had "purposely" refused to permit the plaintiff to return to work because of his handicap, A-8, and despite the fact that he was "at all times ready, willing, and able to work as an engineer." A-6. It specifically asserted that Conrail ignored medical reports that concluded plaintiff was capable of resuming work. A-8. These allegations, if true, constitute precisely the type of discriminatory intent with which section 504 is concerned.[13/] Congress understood that disabled individuals were frequently excluded from employment under, or other participation in, federally assisted programs, not out of malice, but because of

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13/ Section 504 also forbids under certain circumstances conduct by federal grantees which has the effect of discriminating on the basis of handicap. See 49 C.F.R. § 27.7(a)(4)(i).

unfounded preconceptions and stereotypes about their abilities. See pp. 63-68, infra. Those all too common attitudes towards handicapped persons are described in detail in the amicus brief in this case filed on behalf of the American Council of the Blind. Congress enacted section 504, inter alia, to compel recipients of federal assistance to put aside such preconceptions and to accord to "otherwise qualified" handicapped individuals a meaningful equal opportunity to participate in or enjoy the benefits of federally assisted activities. The statute puts recipients on notice that when they act on the basis of handicap they face liablity for a violation of the law if the person or persons affected were in fact qualified for the program or job at issue.

Federal regulations implementing section 504 expressly direct recipients of federal assistance to reevaluate their

policies and practices and to modify those that do not meet the requirements of section 504. 45 C.F.R. § 84.6(c); 49 C.F.R. § 27.12(c). A grantee can, prior to accepting federal assistance, bring to the attention of the granting agency any practices about whose legality it may be in doubt, and "the appropriate federal official will determine whether the grantee's plan, proposal or program will satisfy the condition of the grant ... and the grantee will [thus] have in mind what its obligations will be." Guardians Association v. Civil Service Commission, 51 U.S.L.W. at 5109. (Opinion of Justice White). If a question about such a practice arises after the grant has been accepted, the grantee can call it to the attention of the appropriate federal official and is entitled to a "prompt investigation" of whether that practice would

constitute a violation of section 504. 45 C.F.R. § 80.7(c); 49 C.F.R. § 27.123(c).

The prospect of damage awards serves to induce compliance with both section 504 and the regulations. What this Court has said of Title VII is equally true of section 504. In the case of discrimination in employment, as in other areas:

> [T]he primary legislative objective was a prophylactic one.
>
> "It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. ..."
>
> Backpay has an obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices, and to endeavor to eliminate, so far

> as possible, the last vestiges of an unfortunate and ignominious page of this country's history.

Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975). The prospect of damages serves a similar purpose. It may be, as Justice White noted in Guardians, that a federal grantee will not necessarily know prior to such self-examination whether its employment criteria, program entrance qualifications, or architecture have the effect of excluding the disabled, but without the prospect of retrospective relief such a grantee has no incentive to make that inquiries or to correct the arguable violations they may reveal.

The congressional direction that handicapped individuals receive the same treatment as others benefitting from a federally assisted program can often be achieved, partially if not fully, on a retrospective basis. Compensatory injunc-

tive relief represents a delayed method of providing the victims of discrimination with the same benefits or status that Congress intended that they be afforded at an earlier time. Where non-handicapped students at a school are given a particular form of training, section 504 ordinarily requires that it be provided to disabled students as well. That statutory command is equally applicable to and implemented by the voluntary act of a school admitting handicapped students or by a subsequent court order directing that they be given the instruction that was earlier denied them. An award of damages frequently serves precisely the same "make equal" function. If a disabled employee does the same work for which able-bodied colleagues are paid $100, section 504 directs that the handicapped worker also receive $100. That statutory command is equally implemented

whether the disabled worker receives the $100 as a result of the voluntary act of the employer or due to a court ordered award of damages.

A remedial rule which allowed compensatory injunctive relief but excluded compensatory monetary relief would make little practical sense under Title VI or section 504. If only compensatory injunctive relief were permitted, the victims who could and could not obtain effective redress for a Title VI or section 504 would be determined in an entirely capricious manner. A student illegally excluded from a public school could get relief if he or she sought no other education and waited for an injunction ordering remedial training, but not if he or she went to a private school after that rejection and subsequently sought reimbursement for the tuition. The deterrent effect would be

equally uneven and unpredictable. A grantee which found compliance with section 504 inconvenient or expensive, and which knew that all the injuries caused by its disobedience will be financial and thus incapable of redress, would have every reason to violate the law. In the absence of retrospective relief, section 504 would often be merely precatory; not until the immposition of an injunction or agency order backed by a threat of sanctions would many grantees have any compelling motivation to comply with its commands. Thus, wholly aside from the normal assumption that Congress intended that federal courts have the authority to redress violations of any federal statute, the obvious congressional desire that federal grantees actually comply with the provisions of section 504 compels the conclusion that Congress contemplated that there would be retrospec-

tive monetary relief for such violations.

The unavailability of monetary relief would result in difficult practical and administrative problems for the federal courts. In an ordinary case in which a plaintiff is complaining about the denial of employment or some other act causing economic harm, the additional losses which may occur following the commencement of the action may be corrected at the end of the litigation through an award of damages. To forbid monetary awards would be to transform ordinary financial losses into irreparable injuries. Such a prohibition would thus force the district courts at the very outset of a section 504 case to choose between granting preliminary injunctive relief, and running the risk of placing an unqualified participant or employee in a federally assisted program, or denying the relief, and thus rendering irrevocable what

might later prove to be a serious violation of federal law. Neither the orderly administration of justice nor the legitimate interests of the parties would be served by so restricting the traditional authority of federal judges to manage litigation before them, and there is no indication that Congress intended to impose on the federal courts such a limited and awkward set of alternatives.

This conclusion regarding the scope cance of section 504 is confirmed by other language of the 1978 Senate bill. Section 104 of that measure accorded to handicapped individuals the right to an administrative hearing to review rehabilitation plans prepared for them by state agencies, and, if the plans were upheld, to challenge them in federal court. Subsection 104(f), however, expressly provided "No civil action may be brought under this

section for monetary damages." 124 Cong. Rec. 30293 (1978); see also id. at 30315 (remarks of Sen. Javits). The failure of Congress to include any similar language in the portion of the bill containing section 505(a)(2) can only be understood as indicating the absence of any intention to oppose such a limitation on relief in section 504 cases.[14/]

Justice White's opinion in Guardians Association, however, asserts that under Pennhurst State School v. Halderman, 451 U.S 1 (1981), there is a "presumption" that in an action to enforce Spending Clause legislation private litigants are entitled to no relief other than a prospective

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14/ The conference committee replaced the civil action authorized by section 104 with a right of review by the Secretary of HEW, and subsection (f) was thus eliminated as irrelevant. H. Conf. Rep. No. 95-1780, 95th Cong., 1st Sess., 68-69 (1978).

injunction compelling grantees to comply with the conditions of federal assistance if they chose to continue receiving it. 51 U.S.L.W. at 5109-10. This is not an accurate description of the majority opinion, of Justice White's dissent, or even of the issue presented in Pennhurst. The plaintiff in that case sought in this Court only to "compel compliance with" certain conditions imposed by statute on grants under the Developmentally Disabled Assistance Act. 451 U.S. at 27. The remedial question was whether such compulsion should take the form of an order enjoining federal authorities from providing funds to the grantee if the conditions were not met, or an order directed at the grantee itself requiring compliance. The majority in Pennhurst noted that the former approach was taken in Rosado v. Wyman, 397 U.S. 420 (1970), but that "[i]n other cases

... we have implicitly departed from that rule," 451 U.S at 29, and remanded the question to the court of appeals. Id. at 30. Justice White would have held that prospective relief to enforce the conditions of federal grants should be limited to the type of injunction approved in Rosado, since "the State may terminate such statutory obligations, except those already accrued, by withdrawing from the program and terminating its receipt of federal funds." 451 U.S. at 53 (emphasis added). But as the underscored language makes clear, Justice White himself recognized that a state could not by merely withdrawing from a federal program escape from or alter the obligations that were created by its earlier acceptance of federal funds.

Justice White noted in Guardians with regard to Title VI:

> the possibility that Congress may have felt that the salutary deterrent effect of a compensatory remedy was outweighed by the possibility that such a remedy would dissuade potential recipients from participating in important federal programs. 51 U.S.L.W. at 5111 n.24.

But the legislative history of section 504 contains not a single reference to any such concern. No witness or member of Congress ever mentioned any federal grantee ever having rejected or even considered rejecting federal aid because of the danger of a compensatory award. And nowhere in the thousands of pages of hearings, reports and debates on the vocational rehabilitation legislation of 1973, 1974 and 1978 is there the slightest suggestion that Congress ought to or had restricted the traditional remedies available for violations of federal law in order to reassure squeamish applicants for federal aid.

Back pay and damages are among the forms of relief normally available to the

victim of a violation of federal law, regardless of the motivation of the law-breaker. Nothing in the language or legislative history of section 504 even hints at a congressional desire to depart from that traditional rule, or to shift the cost of such violations from grantees receiving millions or even billions of dollars in federal aid to physically and mentally handicapped individuals who may be unable to protect their interests. To deny monetary relief under section 504 would often be to postpone until the entry of a final court injunction the implementation of legal rights adopted a decade ago for men and women who had already endured "hundreds of years of being alienated, degraded, insulated and otherwise ignored by society. ..." 124 Cong. Rec. 30578 (1978) (remarks of Sen. Stafford). Such a scheme would, as Senator Cranston said of

the rejected McClure amendment, provide "half-remedies for whole wrongs." Ibid.

III. SECTION 504 PROHIBITS EMPLOYMENT DISCRIMINATION UNDER ALL FEDERALLY ASSISTED PROGRAMS

The contention advanced by Conrail in this case is far more radical than that already rejected by this Court in North Haven Board of Education v. Bell, 456 U.S. 512 (1982). In North Haven the petitioners conceded that employment discrimination on the basis of sex was illegal; they asserted no right to fire, demote, or harass female employees because they were women, but merely argued that such mistreatment, admittedly forbidden by Title VII of the 1964 Civil Rights Act and other laws, was not also covered by Title IX of

the Education Amendments of 1972.[15/] In the instant case Conrail contends that neither an aggrieved individual nor any federal agency[16/] is authorized to take any action to prevent or redress employment discrimination on the basis of handicap in a federally assisted program except where providing employment was one of the primary objectives of that program. If that argument is sustained, Conrail would be

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15/ "A holding that § 901 does not prohibit employment discrimination will not sanction such discrimination. Rather, employment discrimination will be remedied by resort to Title VII, the Equal Pay Act [and] the post-Civil War civil rights statutes, 42 U.S.C. § 1983...." Brief for Petitioners, No. 80-986, p. 109.

16/ Br. 22, 23. Petitioner's argument against any private action to remedy such discrimination is premised in part on the assumption that federal agencies are powerless to take such action, and that Congress cannot have intended to "invest individuals with substantive rights broader than ... those subject to agency definition, administration, and enforcement." Br. 10.

free to refuse to hire an attorney because he or she had a bad back, to pay a ticket clerk less because he or she used a cane, or to fire a baggage handler because he or she used a hearing aid. One decision relied on by petitioner actually holds that a school can even discriminate against handicapped instructors in hiring teachers for handicapped children.[17/] The issue raised by petitioner is thus not how Congress intended to enforce a prohibition against employment discrimination on the basis of handicap by federal grantees, but whether Congress intended, save in one small category of cases, to permit the disabled to be barred from jobs in federally funded programs, regardless of their

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17/ Sabol v. Board of Education of Willingboro, 510 F. Supp. 892 (D.N.J. 1981) cited at Brief for Petitioner, p. 7, n.4.

actual qualifications, because of nothing more than stereotypes, fears, or unfounded preconceptions about physical or mental disabilities.

If the coverage of section 504 is limited to employees in federal programs whose primary objective is to create jobs, the reduction in the number of workers protected by that law would, as petitioner acknowledges, be "dramatic."[18/] An analysis prepared in 1976 for the Department of Health, Education and Welfare estimated that section 504, if applied to all federal grantees, would affect more than a million disabled workers.[19/] That Department alone provided funds for more than 36,000 programs and activities.[20/] Only a handful of

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18/ Petition, p. 13.

19/ 41 Fed. Reg. 20312, 20323 (1976).

20/ 1977 House Hearings 299, 358.

these employees and programs would be covered if the application of section 504 were restricted to programs whose primary purpose was to provide employment. The practical effect of such a restriction on the effectiveness of section 504 as a whole would be particularly great because of the frequency and importance of employment discrimination against the disabled. Employment discrimination has consistently been the most common subject of administrative complaints filed with federal officials under section 504; in 1977, for example, 70% of all the section 504 complaints received by HEW concerned employment problems.[21/] Thus any construction of section 504 that sharply limited its application to employment discrimination

21/ 1977 House Hearings 303, 317, 318, 341; see also 1976 Senate Hearings 1500.

would reduce dramatically its overall impact on the problems of handicapped individuals.

(1) The Department of Transportation Regulations

This action was commenced on September 22, 1978. Eight months later[22/] the Department of Transportation adopted regulations under section 504 applicable to Conrail and other recipients of funds administered by DOT. Section 27.31(a)(1) of those regulations provides:

> No qualified handicapped applicant for employment, or an employee shall, on the basis of handicap, be subjected to discrimination under any program or activity that receives or benefits from Federal financial assistance.

This regulation is not limited to discrimination under a federal program whose primary objective is employment, but

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22/ 44 Fed. Reg. 31442 (1979). The regulations are now contained in 49 C.F.R. part 27.

deliberately[23] and without exception applies to all federally assisted programs.

Section 27.31, if valid, is dispositive of this aspect of this litigation. As the Court has repeatedly held, "a court is to apply the law in effect at the time it renders its decisions, unless doing so would result in manifest injustice...." Bradley v. School Board of City of Richmond, 416 U.S. 696, 711 (1974).[24] Section 27.31, although not discussed by the courts below, has been in effect throughout most of the five years that this

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23/ As we note, infra, pp. 47-52, Executive Order 11914 required that the DOT regulations comport with guidelines established by HEW, which in turn require non-discrimination in employment regardless of the purpose of the federally assisted activity. See 44 Fed. Reg. 31442.

24/ Since section 27.31 merely reiterated for DOT grantees the long established HEW construction of section 504, its application to events occurring prior to its issuance in May, 1979, is clearly not unjust.

action has been pending.

In addition to DOT, twenty-five other federal agencies[25/] have promulgated virtually identical regulations forbidding employment discrimination on the basis of handicap in all federally assisted programs. This widespread and uniform construction of section 504 derives from the interpretation long given to the statute by the Department of Health Education and Welfare. In 1976 Executive Order 11914, 41 Fed. Reg. 17871, gave HEW primary responsibility for co-ordinating administrative implementation of section 504, and required DOT and all other federal agencies to issue section 504 regulations "consistent with" the standards formulated by HEW.[26/]

25/ See Brief for United States as Amicus Curiae Supporting Respondent, p. 2 n.2.

26/ This authority was transferred to the Department of Justice by Executive Order 12250, 45 Fed. Reg. 72995 (1982). That

HEW's construction of section 504, insofar as that provision applies to employment discrimination, has been consistent and longstanding. The first HEW regulation was promulgated in June, 1974, nine months after enactment of section 504. The rules issued on that date revised pre-existing provisions concerning vocational rehabilitation programs in order "to implement the provisions of the Rehabilitation Act of 1973." 39 Fed. Reg. 18562 (1974). Section 402.24, entitled "Nondiscrimination for reason of handicapping condition," provided:

> No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in any program, project or activity

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26/ continued

Department, however, also construes section 504 to apply to employment discrimination in all federally assisted programs. See pp. 54-55, infra.

> supported under this part. No qualified individual shall be denied employment in any program, project, or activity supported under this part solely because of a physical or mental disability. 39 Fed. Reg. 18582 (1974) (emphasis added).

Thus the regulations forbad employment discrimination in all such programs despite the fact that providing employment was not a primary objective of the programs covered by those regulations.[27/]

In May 1976, after consulting committees of both the House and Senate as well as some 60 federal, state and local agencies, and organizations familiar with the problem of the disabled,[28/] HEW proposed comprehensive regulations implementing section 504.[29/] The May 1976

27/ Not until 1978 did the Act include a program to provide funds for the express purpose of providing jobs to the disabled. See 92 Stat. 2989 (1978).

28/ 1976 Senate Hearings 1491, 1503-04.

29/ In Southeastern Community College v.

announcement, in addition to seeking public comment on the proposed draft, solicited comments on 15 specific issues about which HEW was particularly uncertain. 41 Fed. Reg. 20296-97. But HEW indicated no doubt as to the scope of section 504's application to employment discrimination. The Department emphasized that "section 504 ... differs from ... title VI in the extent to which it applies to employment practices." Id. at 20296. Section 84.11(9)(1) of the draft regulations

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29/ continued

Davis, 442 U.S. 397, 404 n.4 (1979), this Court suggested that HEW chose to rely on the language of section 504 alone until ordered to issue regulations by Cherry v. Mathews, 419 F. Supp. 922 (1976). In fact, however, the 1976 regulations were first issued two months before the July, 1976, decision in Cherry. That decision noted the issuance of those proposed regulations, and retained jurisdiction over the litigation to ensure that no "unreasonable delays" occurred in the promulgation of final regulations. 419 F. Supp. at 924.

Section 84.11(9)(1) of the draft regulations provided:

> No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment, or in the recruitment, consideration or selection therefor, under any programs or activity to which this part applies.30/

HEW expressly noted that the section 504 regulation concerning employment "generally follows the employment provisions of the Department's regulation implementing Title IX of the Education Amendments of 1972..." Id. at 20300; the Title IX regulations covered all employment discrimination in federal education programs, most of which virtually by definition were not primarily concerned with providing employment. See 45 C.F.R. § 86.51(a)(1).

30/ 41 Fed. Reg. 20307 (emphasis added). The regulation was applicable to all recipients of federal funds from HEW. Section 84.2, 41 Fed. Reg. 20305.

In July, 1976, HEW formally proposed a somewhat modified set of section 504 regulations. The accompanying announcement reiterated in identical language the distinction noted in May between the scope of section 504 and Title VI regarding employment practices, as well as the reliance on Title IX regulations, and section 84.11(a)(1) remained unchanged. 41 Fed. Reg. 29548, 29552, 29563. Although the July announcement contained an extensive discussion of public comments on the May draft, there was no indication that any commentator had raised any question regarding the applicability of the employment provisions to all federally assisted programs. Id. at 29552-54. The final regulations ultimately promulgated by HEW in May of 1977 were, like the draft released a year earlier, applicable to employment discrimination in all federally assisted

programs. 45 C.F.R. § 84.11(a)(1).

The correctness of HEW's construction of the law was not questioned until the decision of the Fourth Circuit in Trageser v. Libbie Rehabilitation Center, 590 F.2d 87 (4th Cir. 1978), cert. denied 442 U.S. 947 (1979), held that the Comprehensive Rehabilitation Services Amendments of 1978 restricted section 504 to employment discrimination in federal activities whose primary purpose was to provide employment. Trageser was decided only 42 days after the adoption of the 1978 amendments, and the court conceded it did not know how HEW would construe the new legislation. 590 F.2d at 89 n.11. The courts of appeals following Trageser have either ignored[31/]

31/ Scanlon v. Atascadero State Hospital, 677 F.2d 1271, 272 (9th Cir. 1982); United States v. Cabrini Medical Center, 639 F.2d 908, 910-11 (2d Cir. 1981); Simpson v. Reynolds Metals Co. Inc., 629 F.2d 1226, 1236-37 (7th Cir. 1980).

or refused to consider[32/] HEW's construction of section 504. The appellate opinions rejecting the Trageser limitation, on the other hand, have expressly relied on the broad administrative interpretation of section 504.[33/]

The administrative agencies responsible for applying section 504 have consistently disapproved Trageser's construction of the 1978 amendments. In March, 1979, HEW considered and rejected suggestions that it alter its standards in light of Trageser, insisting that its guidelines

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32/ Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672, 675 n.7 (8th Cir. 1980).

33 / LeStrange v. Consolidated Rail Corporation, 687 F.2d 767, 776 (3d Cir. 1982), A-52-53; Jones v. Metropolitan Atlanta Rapid Transit Authority, 681 F.2d 1376, 1382 (11th Cir. 1982); Scanlon v. Atascadero State Hospital, 677 F.2d 1271, 1273 nn.3-4 (9th Cir. 1982)(Perguson, J., dissenting); Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672, 677 n.3, 678 n.6 (8th Cir. 1980)(McMillan, J., concurring).

"reflect the Department's current interpretation of its authority". 44 Fed. Reg. 17162, 17174. In 1980 the Department of Justice published a detailed analysis reaffirming the government's view that "the employment practices of recipients of federal financial assistance are covered by section 504 regardless of the purpose of the assistance" and expressly declining to follow Trageser. 45 Fed. Reg. 37628. The United States has aggressively advanced this construction of section 504 in the courts, both in litigation to which it was a party[34/] and through amicus curiae briefs in several cases.[35/]

In sum, the construction of section

34/ United States v. Cabrini Medical Center, supra.

35/ Scanlon v. Atascadero State Hospital, supra; Trageser v. Libbie Rehabilitation Center, supra; Sabol v. Board of Education of Township of Willingboro, 510 F. Supp. 892 (D.N.J. 1981).

504 contained in section 27.31 of the DOT regulation embodies a widespread, long-standing and consistent administrative interpretation of the law, an interpretation first announced only months after the adoption of the 1973 act, emphasized by HEW shortly after that agency was given primary authority for implementing section 504, strongly reiterated following the 1978 amendments, and now followed by a total of 26 federal agencies. This reading of section 504, concurred in by the Departments of Transportation, Justice, and Health, Education and Welfare, is entitled to the "great deference to the interpretation given [a] statute by the officers or agency charged with its administration." Udall v. Tallman, 380 U.S. 1, 16 (1965).

(2) The Rehabilitation Act of 1973

Although both Trageser and petitioner focus their arguments on the 1978 amend-

ments to the Rehabilitation Act, an analysis of the meaning of section 504 must begin with the original enactment of that provision in 1973.

No court prior to the adoption of the 1978 amendments questioned the applicability of section 504 to employment discrimination in all federally assisted programs.[36/] This judicial acceptance of HEW's construction of the law is understandable in light of the actual wording of section 504:

> No otherwise qualified handicapped individual in the United States, as

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36/ See Whitaker v. Board of Higher Education, 461 F. Supp. 99 (E.D.N.Y. 1978); Davis v. Bucher, 451 F. Supp. 791 (E.D Pa. 1978); Duran v. City of Tampa, 451 F. Supp. 954 (M.D. Fla. 1978), 430 F. Supp. 75 (M.D. Fla. 1977); Drennon v. Philadelphia General Hospital, 428 F. Supp. 809 (E.D. Pa. 1977); Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976) aff'd on other grounds, 556 F.2d 184 (3d Cir. 1977); cf. Cook, Nondiscrimination in Employment Under the Rehabilitation Act of 1973, 27 Am. U. L. Rev. 31, 43 n.71 (1977).

> defined in section 7(b), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal assistance.

Nothing in the broad language of this statute affords any basis for limiting its application to only some employees, certain programs, or particular types of discrimination. "No individual', not "very few individuals", may be discriminated against. "Any program", not "most programs or activities", is forbidden to discriminate.[37/] The prohibition is not limited to denials of benefits or exclusion from participation, but extends broadly to any "discrimination under" federally assisted programs. Here, as in North Haven Board of Education v.

37/ United States v. Cabrini Medical Center, 639 F.2d 908, 910 (2d Cir. 1981), one of the lower court cases relied on by petitioner, concedes that this reference to "any program" "at first blush seems broad enough" to cover all employment claims.

Bell, 456 U.S. 512, 521 (1982), a handicapped "employee who works in a federally funded program is 'subject to discrimination under' that program if ... paid a lower salary for like work, given less opportunity for promotion, or forced to lower salary for like work, given less opportunity for promotion, or forced to work under more adverse conditions than are" his or her non-handicapped colleagues.

The fact that section 504 does not expressly mention employment is clearly of no significance, for the statute does not refer to any specific types of discrimination, but is deliberately cast in all-inclusive general terms. Congress's alleged "failure" to single out employment for particular emphasis no more militates against respondent's claims than Congress's "failure" to mention specifically railroads, or grantees receiving over $1

billion, or discrimination against employees who had lost their left, rather than right hands.[38/]

Had Congress intended to exclude from the scope of section 504 employment discrimination not involving federal employment programs, it certainly knew how to do so. In May of 1972, only four months before section 504 was drafted by the Senate Subcommittee on the Handicapped,[39/] a House-Senate conference committee considered and deleted from Title IX of the Education Amendments an express limitation identical to that which Conrail now seeks to read into section 504. North Haven Board of

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38/ See Guertin v. Hackerman, 496 F. Supp. 593, 595-96 (S.D. Tex. 1980)(rejecting defendants' contention that section 504 applies only to public agencies receiving federal assistance.)

39/ See 118 Cong. Rec. 30680 (remarks of Senator Randolph).

Education v. Bell, 456 U.S. at 528. In addition, section 904 of those Amendments forbad discrimination against the blind by recipients of federal aid to education, but was specifically limited to discriminatory exclusion from "any course of study" and thus literally inapplicable to employment discrimination. 20 U.S.C. § 1684. No such express limitations were placed in section 504.

A broad literal reading of section 504 is strongly supported by section 7(6) of the 1973 act, whose definition of "handicapped individual" delineated the persons protected by section 504. Section 7(6) then provided:

> The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabili-

> tation services provided pursuant to Title I and III of this Act.

87 Stat. 361 (1973). Only individuals whose handicap might have inhibited but did not preclude them from working were protected from discrimination by section 504. This definition would have made no sense if section 504 had been generally inapplicable to employment discrimination.

This construction of section 504 is also consistent with the overall goals and other provisions of the Rehabilitation Act. The primary focus of that Act is on enabling the disabled to obtain work. Section 2(8), in a clear reference to section 504, states that a purpose of the Act is to

> promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment.

87 Stat. 357 (1973). None of the stated purposes of the statute refer to promoting

and expanding opportunities for the disabled in any other specific area. Title I authorized $1.3 billion in grants to assist handicapped individuals to "prepare for and engage in gainful employment to the extent of their capabilities". 87 Stat. 363. Having provided more than a billion dollars to assist the disabled to return to the work force, it would have been "odd indeed" if Congress had condoned in section 504 the very type of employment discrimination in federally assisted programs which would have frustrated that vital and costly program. Scanlon v. Atascadero State Hospital, 677 F.2d 1271, 1274 (9th Cir. 1982)(Ferguson, J., dissenting). To hold section 504 largely inapplicable to employment discrimination would be like holding Title IX inapplicable to the exclusion to female students from federally funded programs of study.

The legislative history of the 1973 Act fully supports HEW's construction of section 504. Section 504 was drafted by the Senate Subcommittee on the Handicapped after extensive hearings in May and June 1972. Virtually the only form of discrimination against disabled persons which was disclosed at the Senate hearings was discrimination in employment. One study, based on the experience of the President's Committee on Employment of the Handicapped, concluded:

> [T]he disabled face all the obstacles to the able bodied and a myriad of special ones caused by their handicap .... The stigma associated with disability ... hurts the job seeking individual. An employer who does not feel comfortable around a disabled person will not be inclined to hire the handicapped. [C]ertain disabilities, among them epilepsy, and mental illness, carry more stigma than others, but employers react negatively in many cases to any type of disability .... Initially sympathetic employers may also be scared away by the fear that their insurance rates

> will rise if they hire the handicapped ... [although] the safety record of the disabled worker on the job is 8% better than that of the average worker.... Another barrier to employment of the handicapped is the stereotype that exists about their job capabilities. Too often they are seen as workers who can only perform menial tasks. They are regarded as suitable sign painters ... but not as competent white-collar workers.40/

Employment discrimination was a frequent focus of Senate discussion during the year when section 504 was drafted.41/ In

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40/ Hearings on the Rehabilitation Act of 1972 before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 92nd Cong., 2d Sess., 534-536 (1972 (hereinafter cited as "1972 Senate Hearings"); see also id. at 1361-62 (employment discrimination against the deaf).

41/ 118 Cong. Rec. 525 (remarks of Sen. Humphrey) ("Millions of young persons and adults who want to learn a trade, work like other people, and establish their selfworth through a paycheck, are barred ... from countless jobs they could do well."), 3321 (remarks of Sen. Williams) ("Too many of our handicapped population are misdiagnosed, mislabled, and hustled out ... of jobs ...."), 9495 (remarks of Senator Humphrey) (victims of discrimina-

February of that year Senator Williams, who later cosponsored the bill containing section 504 and who chaired the Committee on Labor and Public Welfare which reported it to the Senate, placed in the Congressional Record a series of letters describing in graphic detail the employment discrimination suffered by disabled workers. 42/

41/ continued

tion against the handicapped include individuals "who can and want to learn a trade and experience the dignity of work and a paycheck."), 19435 (remarks of Sen. Williams)(placing in record student essay on the employment problems of the disabled); 33319 (remarks of Sen. Dole)("Too many employers are still reluctant to hire the handicapped and look first to disabilities rather than the skills and talents the handicapped possess."); 36761 (remarks of Sen. Mondale) (placing in the record article entitled "Handicapped Tell of Discrimination in Finding Jobs and Getting Insurance")(1972).

42/ 118 Cong. Rec. 3324 (letter of Robert L. Bennett) ("Quite possibly the greatest handicap a handicapped person has is being disqualified for work solely because he is somewhat different.... I am an

Williams noted that the unemployment rate was 52% among paraplegics, 66% among the blind, and 75% among epileptics.[43] The

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42/ continued

epileptic who was refused employment by the Post Office"), 3325 (letter of Charles Bright)("In 1921 I had polio which paralyzed me from the waist down.... Today, with the use of a brace on my right leg and a cane, I do quite well.... I found myself with an almost insurmountable problem -- that of finding a job.... I have had more doors closed in my face, because I was ... handicapped than I care to remember"), 3327 (letter of Mrs. JoAnn Marshall) ("Generally ... handicapped people are the last hired and the first fired.... My husband, a paraplegic has ... been told 'you can't do it' for so long that if it weren't for his tremendous belief in himself and his ability he would have been beaten long ago"), (letter of David Zeise)("I had a 3.5 average, a good record, and excellent recommendations from my teachers. Nevertheless, I've been having a difficult time finding employment because of my poor vision"); (letter of Max Feintuch)("How does a man gain recognition when he isn't given a chance to show what he can do?... [My son's] physical condition always stands in the way of an appointment despite his superior skill and qualifications").

43/ 118 Cong. Rec. 3321.

Senate report accompanying the Rehabilitation Act explained, in a passage reiterated during the Senate debate,[44/] that the hearings had revealed "a lack of action in areas related to rehabilitation which limit a handicapped individual's ability to function in society, e.g., employment discrimination...." S. Rep. No. 93-318, 93rd Cong., 1st Sess., p. 4 (1973). During the 1973 debates both Senator Cranston,[45/] the floor manager of the bill, and Senator Stafford,[46/] a cosponsor and the ranking minority member of the subcommittee which drafted it, referred to evidence of "unfounded discrimination in employment" which had been presented at the subcommittee hearings.

44/ 119 Cong. Rec. 24566 (1973) (remarks of Sen. Cranston).

45/ 119 Cong. Rec. 5882.

46/ 119 Cong. Rec. 5893.

Senator Randolph, introducing the committee bill, noted that its overall goal was to "provide a bright, new beginning on the road to meeting the goal of self-sufficiency ... for millions of handicapped Americans."[47/] Senator Taft explained:

> The basic purpose of vocational rehabilitation continues to be to help physically and mentally handicapped individuals achieve the ability to work, earn, and live independently in their community. ....Too many handicapped Americans ... lack jobs and too many are underemployed -- utilized in capacities well below the levels of their training, education and ability. 119 Cong. Rec. 24587.

Senator Cranston noted that the federal vocational rehabilitation efforts were being frustrated by employment discrimination against disabled workers:

47/ 118 Cong. Rec. 30680; see also id. at 30681 (remarks of Sen. Cranston)("The program which is authorized by the legislation will provide ... a true opportunity for [handicapped] individuals to enter or re-enter society on a competitive basis....")

> Despite efforts on the part of ... personnel of the vocational rehabilitation programs, discrimination in placement, hiring and advancement continue to limit the vocational rehabilitation program's ability to effect successful rehabilitations.... The expenditure of money on vocational rehabilitation programs is not well spent if we do not at the same time take meaningful steps to ... provide substantial accomplishments in employment for handicapped individuals. 119 Cong. Rec. 5882.

Senators Javits[48/] and Taft[49/] expressed similar concerns.

48/ 119 Cong. Rec. 5898 ("During hearings on H.R. 8395, it became patently obvious that revision of the existing Federal-State programs for rehabilitation of handicapped indiviudals would not solve all of the problem of handicapped individuals particularly in terms of employment. Several additional provisions within H.R. 8395 ... dealt directly with these problems.... [T]he bill ... prohibits discrimination against handicapped individuals in any program or activity receiving federal assistance.")

49/ 119 Cong. Rec. 24587 ("[I]f we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program, we must devote more of our energy toward the elimination of the most disgraceful barrier of all -- discrimination.")

In light of the importance of eliminating employment discrimination against the disabled, it is hardly surprising that several sponsors of the 1973 Act explained that that was the precise purpose of section 504. Senator Williams noted that the act contained "prohibitions against discrimination in employment in programs assisted with federal funds...." 119 Cong. Rec. 24588. Senator Javits explained that among the portions of the bill addressing "special federal responsibilities" were "provisions for encouraging hiring of the handicapped under federal contracts and under federal grants." 118 Cong. Rec. 32305. Senator Cranston repeatedly asserted that the Act "deal[t] comprehensively with problems such as discrimination in ... federal grants ... problems which ... have a profound effect on the provision of relevant and effective [rehabilitation]

services."[50/]

Between September, 1972, when it was first drafed, and September, 1973, when it was signed into law, section 504 was referred to eight times in three committee mittee reports[51/] and in fifteen instances during House and Senate debates.[52/] On not a single occasion is there the slightest indication that any member of Congress

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50/ 119 Cong. Rec. 5862 (emphasis added); see also id. at 24569.

51/ S. Rep. Nov. 1135, 92d Cong. 2d Sess., 3, 9, 49, 77 (1972): S. Rep. No. 93-318, 93rd Cong., 1st Sess., 18, 50, 70 (1973) H. Conf. Rep. 92-1581, 92nd Cong., 2d Sess., reprinted in 118 Cong. Rec. 35163.

52/ 118 Cong. Rec. 30681, 30682 (two references), 30683 (remarks of Sen. Williams), 32280 (remarks of Sen. Cranston), 32281 (remarks of Sen. Cranston), 32305 (remarks of Sen. Javits), 32310 (remarks of Sen. Humphrey), 32613 (remarks of Sen. Cranston); 119 Cong. Rec. 5862 (remarks of Sen. Cranston), 5898 (remarks of Sen. Williams), 24569 (remarks of Sen. Cranston), 24587 (remarks of Sen. Randolph), 24588 (remarks of Sen. Williams), 24589 (remarks of Sen. Dole).

understood or intended section 504 to have a scope narrower than its broad literal meaning. On not a single occasion is there any reference to section 604 of Title VI or to federal programs whose "primary objective ... is to provide employment." The draftsmen of section 504 could hardly have been more emphatic in explaining their preoccupation with employment discrimination, and a member of Congress who read section 504, reviewed the relevant reports, and listened to the debates, could only have concluded that it was to employment discrimination above all that section 504 was to apply.

(3) The Rehabilitation Act Amendments of 1974

In 1974 Congress amended section 7(6) of the Act to remove employability as a prerequisite to protection under section 504. The legislative history of that amend-

ment 53/ makes clear the understanding of Congress that section 504 applied generally to employment discrimination. The Senate report explained

> It was clearly the intent of the Congress in adopting section 503 (affirmative action) and section 504 (nondiscrimination) that the term "handicapped individuals" in those sections was not to be narrowly limited to employment ... 54/

Senator Stafford reiterated the argument made in 1973 regarding the relationship between rehabilitation programs and nondiscrimination in employment. 120 Cong. Rec. 30532 (1974).

53/ 88 Stat. 1619. The amendment added to section 7(6) the following language:

> "For the purposes of titles IV and V of this Act such term means any persons who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment."

54/ S.Rep. No. 93-1297, 93rd Cong. 2d Sess., 37-38 (1974) (emphasis added).

The recently promulgated HEW regulations, which forbad employment discrimination without regard to the "primary objective" of the federal assistance, were also the subject of comment. See p. 48, supra. The Senate report noted that HEW, in drafting its regulations, had worked closely with the relevant House and Senate Committees in a "generally useful and satisfactory" manner "to ensure that implemenation of the provisions of the Act would be accomplished in accordance wtih the intent of Congress." The resulting regulations were "in most respects reflective of underlying congressional intent," except where, as in the case of section 7(b), "clarifying and perfecting changes in the Act" were needed.[55/] Senator Cranston expressed identical views on the floor of the Senate. 120 Cong. Rec. 30530. This approval of HEW's regulations was expressed

within a year of the adoption of section 504 by the same committee which had drafted and the same Congress which had enacted that provision.

Petitioner asserts that the Senate report "noted that Section 504 was to be interpreted ... in pari materia with Title VI." (Br. 17.) But the passage relied on by petitioner refers, not to Title VI as a whole, but only to section 601 of the 1964 Civil Rights Act, and mentions Title IX as well:

> Section 504 of was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (relating to race, color, or national origin), and section 901 of the Education Amendments of 1972, 20 U.S.C. 1681 (relating to sex). S. Rep. No. 93-1297, 39.

To the extent that any conclusion can be

55/ S.Rep. No. 93-1297, 93rd Cong. 2d Sess., 25 (1974).

drawn from this statement, it supports a broad literal reading of section 504. Section 901 has already been held by this Court to be fully applicable to employment discrimination, North Haven Board of Education v. Bell, 456 U.S. 512 (1982), while the scope of section 601 is at best unclear. 456 U.S. at 530 n.20. More importantly, North Haven expressly disapproves construing one statute by resort to the legislative history of some other provision after which it may have been patterned. "It is Congress' intention in" 1973, "not in 1964, that is of significance in interpreting" section 504. 456 U.S at 529.[56/]

56/ In 1975 the Senate adopted, as part of the Education for All Handicapped Children Act, Pub.L. 94-142, a provision requiring the recipients of assistance under that statute to take affirmative action to employ and promote qualified handicapped individuals. A House-Senate conference committee deleted this provision with the following explanation:

(4) Rehabilitation Amendments Of 1978

Petitioner's central contention, and the theme of Trageser and its progeny, is that Congress, by enacting in 1978 section 505(a)(2) of the Rehabilitation Act, intended to limit the application of section

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56/ continued

> "The conferees deleted the language in the Senate bill making financial assistance conditional upon ... asssurances [of affirmative action] because section 504 of the Rehabilitation Act of 1973 already establishes, as a matter of federal law, that no qualified handicapped individual in the United States shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal Financial assistance. It is clear that qualified handicapped individuals who, because of their handicap, are refused employment by recipients of assistance under the Act are fully covered by the prohibition in section 504 of the Rehabilitation Act of 1973."

S. Conf. Rep. No. 94-455, 94th Cong., 1st Sess., 54 (1975). (emphasis added)

504 to employment discrimination in federal programs whose primary objective is to provide employment, and thus to invalidate section 86.51(a)(1) of the HEW regulations. The Congress which enacted section 505(a)(2) was familiar to an unusual degree with HEW's construction of section 504 and had been instrumental in prompting HEW to formulate and issue in 1976 and 1977 the regulations embodying those views.[57/] In January, 1977, HEW Secretary Mathews forwarded HEW's proposed regulations to Congress with a letter expressing the Department's desire "to lay its interpretation before the Congress so that it can provide whatever

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57/ S. Rep. No. 93-1297, 39-40 (1974); 1976 Senate Hearings 323 (testimony of Rep. Dodd), 1502 (statement of Sen. Williams), 1511 (statement of Sen. Williams). Hearings on S.2600 before the Subcommittee on the Handicapped of the Senate Committee on Human Resources, 95th Cong., 2d Sess., 5, 1130-31, 1244, 1247, 1269-70, 1281 (1978)(hereinafter cited as "1978 Senate Hearings").

clarification is appropriate".[58] In April of 1977 Joseph Califano, the new Secretary of HEW, wrote individually to every member of House and Senate, enclosing a copy of the final regulations, and urging that "Congress evaluate the regulation, and the implementation process, to ensure that they conform to the will of Congress."[59] Following the promulgation of the HEW regulations, a House subcommittee conducted further hearings on the implementation of section 504 at which the Director of HEW's Office of Civil Rights provided a detailed description of the employment discrimination provisions.[60]

By 1978 Congress was thus fully aware of the content of the HEW regulations. The

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58/ 1977 House Hearings 73.

59/ Id. at 76.

60/ 1977 House Hearings 294-95.

central issue presented by the 1978 amendments is whether Congress intended to drastically narrow the scope of section 504 and to overturn one of the critical provisions of the HEW regulations whose issuance had been sought by Congress only a year before.

Section 505(a)(2) provides:

> The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under Section [504] of this title.

Petitioner contends that this language incorporates into section 504 the substance of section 604 of Title VI, which precludes any agency enforcement action regarding employment discrimination "except where a primary objective of the Federal financial assistance is to provide employment". Petitioner further contends that by thus

incorporating section 604 Congress intended to preclude private as well as agency action to prevent or redress employment discrimination other than in a federal employment programs.

Petitioner's proposed construction flies in the face of the literal language of section 505(a)(2). First, section 505(a)(2) does not refer to all of Title VI, but only to the "remedies, procedures and rights" contained in that Title. Section 604 is neither a "remedy", a "right" nor a "procedure"; it does not provide persons aggrieved by a violation of Title VI with any substantive entitlements, with any form of redress, or with any method for obtaining that relief.[61/]

61/ Black's Law Dictionary defines a "remedy" as the means employed to enforce a right or redress an injury. (Rev. 5th ed. 1979) p. 1103. The term "right" generally connotes "a power, privilege faculty, or demand, inherent in one person and incident

Petitioner itself never describes section 604 as a right, remedy, or procedure, but consistently and accurately refers to it instead as a "limitation"[62/] or "restriction"[63/]. Had Congress intended to incorporate into sections 504 and 505 all of Title VI, the "restrictions" as well as the "rights," it could and would have said so. Second, the Title VI machinery referred to by section 505(a)(2) is not made the exclusive method of redress open to an aggrieved individual. Section 505(a)(2) is merely permissive, it provides that the Title VI rights, remedies and procedures

61/ continued

upon another" Id. at 1189. "Procedures" prescribe methods of "enforcing rights or obtaining redress for their invasion". Id. at 1083. The provisions of section 604 obviously fit none of thse definitions.

62/ Brief for Petitioner, pp. 2,6,8; Petition for Writ of Certiorari, pp. 8, 10, 12.

63/ Brief for Petitioner, pp. 13, 19; Petition for Writ of Certiorari, pp 10, 14 n. 7.

"shall be available", but does not forbid resort to other rights, remedies or procedures. Far from "evincing an intent to require identical enforcement" of Title VI and section 504 (Br. 19), the words "shall be available" demonstrate an intent merely to add Title VI enforcement methods to whatever other devices might already be available to enforce section 504. Third, the restriction contained in section 604, as petitioner itself concedes (Br. 9), is literally applicable only to action by "any department or agency", not to litigation brought by a private individual. Thus even if section 505 had expressly made section 604 applicable to the enforcement of section 504, such a provision still would not affect the ability of the federal courts to afford relief in a civil action such as this. Petitioner suggests that a literal reading of section 604 would give

private individuals greater enforcement authority than is enjoyed by Federal agencies. (Br. 10). But section 505 does not limit agency enforcement either, not merely because section 604 is not a right, remedy and procedure and because section 505 makes Title VI enforcement methods "available" but not mandatory, but also because section 505(a)(2), which incorporates the relevant Title VI provisions, itself applies only to actions by aggrieved "persons". Thus, the limitation contained in section 604 is inapplicable to private parties because of the literal language of section 604, and inapplicable to federal agencies because of the literal language of section 505(a)(2).

If section 505(a)(2) had the meaning urged by petitioner, it would have legalized employment discrimination against the handicapped in literally millions of jobs

where it had been forbidden from 1973 through 1978. Such an implied partial repeal of section 504 is not to be inferred in the absence of unequivocal statutory language. Morton v. Mancari, 417 U.S. 535, 549-51 (1974). Other aspects of the 1978 amendments militate strongly against such a construction of section 505(a)(2). Section 505 itself is entitled "Remedies and Attorneys' Fees," 92 Stat. 2982, a title which clearly indicates the author's belief that they were assisting the implementation, not narrowing the substantive scope, of section 504. The provision for counsel fees contained in Section 505(b) signals a general congressional intent to facilitate rather than impede private enforcement of section 504. The programs authorized by the 1978 amendments confirmed the priority Congress continued to attach to the employment of handicapped individ-

uals. Section 101, for example, authorized over $3.7 billion over four years for vocational rehabiliation programs, programs which would be directly frustrated by employment discrimination against the disabled. It is inconceivable that Congress would in the same statute have committed billions of dollars in aid to rehabilitate and provide jobs for disabled individuals, and yet simultaneously have legalized discrimination against that very disadvantaged group by the recipients of other federal grants.

The report of the Senate Committee which drafted section 505(a)(2) explained that, far from restricting the scope of 504, that new provision was "designed to enhance the ability of handicapped individuals to assure compliance with the Civil Rights Provisions of Title V ..."[64/] The

64/ S. Rep. No. 95-890, 95th Cong, 2d Sees., 18 (1978).

report made clear that the phrase "procedures, remedies and rights set forth on Title VI" referred to the administrative rules which had been issued by HEW for implementing Title VI:

> It is the committee's understanding that the regulations promulgated by the Department of Health, Education and Welfare with respect to procedures, remedies, and rights under Section 504 conform with those promulgated under Title VI. Thus, this amendment codifies existing practice as a specific statutory requirement. 65/

That understanding was entirely correct. HEW's section 504 regulations expressly incorporated the procedural provisions of the Title VI regulations; section 84.61 provided:

> The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in § 80.6-80.10 and Part 81 of

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65/ Id. 19 (emphasis added).

this Title. 66/

The cited Title VI regulations, which the commentary accompanying section 504 described as "complaint and enforcement procedures", concerned compliance reports, the conduct of investigations, methods for bringing about compliance, and the conduct of administrative hearings. See 42 Fed. Reg. 22694-701 (1977). The procedural regulations incorporated by reference into the section 504 regulations, and reprinted with them in the Federal Register, did not, however, include section 80.3 of the Title VI regulations, which limited the application of Title VI to employment discrimination in federal employment programs. 45 C.F.R. § 80.3 (c).

66/ 42 Fed. Reg. 22685 (1977). HEW had earlier declared its intent to incorporate by reference into section 504 the Title VI procedural regulations. 41 Fed. Reg. 29548 (1976).

Thus when the Senate report asserted that the "procedures, rights and remedies" under the section 504 regulations "conform with those...under Title VI", it was referring to the incorporation by reference into section 84.61 of the procedural provisions of the Title VI regulations. The Senate committee did not, as petitioner suggests, "overlook the differences between the HEW regulations... under Title IV and Section 504... with respect to employment practices." (Br. 21.) Rather, it was the identical Title VI and Section 504 procedural regulations, not their differing substantive provisions, to which the words "procedures, rights and remedies" in both the Senate report and section 505(a)(2) refer.

Petitioner's suggestion that Congress intended section 505(a)(2) to radically reduce the protection afforded handicapped

workers is inconsistent with the continued concern about employment discrimination articulated during the Senate debates.[67/] In opposing an amendment that would have limited the extent to which alcoholics and drug abusers were protected by Section 504, Senators Williams and Hathaway quoted a 1977 opinion of the Attorney General that: "section 504 does in general prohibit discrimination against alcoholics and drug addicts in federally assisted programs solely because of their status as such."[68/]

67/ 124 Cong. Rec. 30304 (remarks of Sen. Randolph) ("One of the areas where handicapped Americans have been subjected to unconscionable discrimination...has been in the area of employment"), 30325 (remarks of Sen. Hathaway) ("There is ample evidence that addicts and alcoholics are subject to discrimination in access to...employment")

68/ 124 Cong. Rec. 30323 (remarks of Sen. Williams), 30324-5 (remarks of Sen. Hathaway). Williams also quoted an opinion by the Secretary of HEW that "an alcoholic or drug addict may not be...disqualified from employment solely because of his condition ..." Id. at 30323.

In arguing against a proposal that would have narrowed the circumstances under which courts could grant injunctive relief to redress employment discrimination by the federal government, Senator Cranston asserted:

> I believe that the requirement with respect to Federal contractors and grantees should be no less stringent that the requirements attached to the Federal Government. The amendment would create an unwise and unrealistic distinction with respect of employment between the obligations of the Federal Government and the obligations of Federal contractors and grantees... [T]he... amendment would limit... the Federal Government's obligation of being an equal opportunity employer. Federal contractors and grantees would appropriately continue to be required to be equal opportunity employers. Rather than a leader in this field, the Federal Government would become a distant also-ran requiring more of its grantees and contractors than it would be willing to require of itself.

124 Cong. Rec. 30577-7. This argument would simply have made no sense if, as petitioner suggests, section 504 did not apply to the employment practices of most

federal grantees.

The sponsors and proponents of the Senate bill repeatedly assured their colleagues that the purpose and effect of the legislation were to expand the opportunities for the disabled. Senator Randolph, the floor manager, opened the debate by asserting that "[a]ll of the provisions of this bill... not only provide opportunities to handicapped Americans to aspire to certain goals but also provide the means by which they can reach those goals." 124 Cong. Rec. 30303. Senator Javits announced that the bill would "properly expand structures currently in place to protect the rights of [disabled citizens]." And Senator Cranston, the author of section 505(a)(2),[69/] explained in a direct reference to that section that "[p]rovisions in the ... bill such as...certain

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69/ 124 Con. Rec. 30346-47.

application of appropriate Civil Rights remedies...should be important steps in our continuing efforts toward full participation in society by handicapped Americans."[70/]

The discussion of the HEW regulations by the Congress which enacted the 1978 Amendments are entirely inconsistent with any intent to overturn section 84.11. In the spring of 1977, when the proposed section 504 regulations containing section

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70/ 124 Cong. Rec. 37509; see also id. at 30303 (remarks of Sen. Randolph) (bill "affirms not only the rights of these severely and profoundly handicapped individuals but also strengthens the rights and protections of all citizens"), 30337 (remarks of Sen. Dole)(bill "provides a host of opportunities for the handicapped"), 30349 (remarks of Sen. Cranston)(bill "promises a major step forward in our continuing efforts to assist handicapped individuals") 37506 (remarks of Sen. Stafford)(bill "will significantly enhance the opportunities for handicapped individuals") 37508 (remarks of Sen. Hathaway) (bill will "renew our national commitment to help these individuals help themselves").

84.11 were awaiting final action, members of both the House and Senate repeatedly took the floor to urge HEW to approve them as written. Representative Koch deplored Secretary Califano's lack of commitment to signing the regulations "in their current form". 124 Cong. Rec. 10455. Congressman Dodd expressed concern about possible changes in the proposed, insisting "these regulations must not be weakened". Id. at 10823. Senator Cranston called for the "prompt and effective implementation" of the regulations, and wrote to Secretary Califano urging that the draft "be considered presumptively valid" and expressing opposition to any changes that might weaken them. Id. at 12410. Those pressing for issuance of the final regulations repeatedly stressed the need for protection against employment discrimination. Congressman Koch insisted that those handicapped indi-

viduals who favored, as he did, promulgation of the regulations, "are simply demanding the right to participate as equals for opportunities for jobs they are capable of doing."[71/] The final promulgation of those regulations by HEW was greeted with virtually unanimous praise by the Congress, with many speakers again referring to the problem of employment discrimination.[72/] The only concerns expressed

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71/ 123 Cong. Rec. 10455; see also id. at 10292 (remarks of Rep. Koch) ("Delays in implementing section 504 have been cited as contributing to the consistently high rate of unemployment among disabled persons ..."), 10822 (remarks of Rep. Dodd)(the disabled "must not be forced to wait any longer before they are allowed to enjoy the same rights to a job...that the rest of our citizens have."), 12216 (remarks of Sen. Humphrey)(disabled regard section 504 as a "charter for fair employment in jobs for which they qualify").

72/ 123 Cong. Rec. 12760 (remarks of Sen Randolph), 13342 (remarks of Sen. Cranston), 13515 (remarks of Sen. Humphrey), 13635 (remarks of Rep. Brodhead), 14133 (remarks of Rep. Koch), 14552 (remarks of Sen. Haskell).

about the regulations focused on whether the federal government should bear a share of the financial cost of compliance,[73/] and Congress declined either to alter the statute because of such costs or to authorize additional federal funds to help defray them.

If, as petitioner urges, Congress intended section 505(a)(2) to incorporate section 604 of the 1964 Civil Rights Act and to override the well-known HEW regulations regarding employment discrimination, that intent was carried out through a conspiracy of silence. Nowhere in over 3000 pages of hearings, four committee reports, or two years of debate is there a reference to section 604. Not a single

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73/ 123 Cong. Rec. 17546-48 (remarks of Rep. Jeffords), 19051-52 (remarks of Rep. Jeffords), 32618 (remarks of Rep. O'Brien). Neither Jeffords nor O'Brien voiced any objection to the substantance of the regulations.

witness, Representative or Senator ever voiced the slightest objection to the HEW regulations, or suggested that fewer federal grantees would be forbidden to discriminate on the basis of handicap. Nothing in the reports or debates could have alerted the House or Senate to the possibility that the 1978 amendments would reduce the protections and remedies which for five years had been available to disabled workers. If the authors of section 505(a)(2) intended to overturn the HEW regulations and partially repeal section 504, theirs was a plan that was never articulated to solve a problem that had never been mentioned through a change that was never revealed to any of their colleagues. "[I]n light of the great emphasis which the Act places upon securing employment opportunities for handicapped individuals, it is remarkable to attribute to

Congress a desire to gut this protection by such a deft, unheralded maneuver." Hart v. County of Alameda, 485 F. Supp. 66, 72 (N.D. Cal. 1979)[74/]

IV. THE DISCRIMINATION ALLEGED IN THIS CASE CONSTITUTED "DISCRIMINATION UNDER [A] PROGRAM OR ACTIVITY RECEIVING FEDERAL ASSISTANCE" WITHIN THE MEANING OF SECTION 504

Section 504, in language identical to that in Title VI and Title IX, provides that no person may on an impermissible basis "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any

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74/ Because of its view of section 504, the Court of Appeals did not have occasion to decide whether providing employment was "a primary objective" of any of the programs under which petitioner has received federal assistance. Should this Court hold that section 504 only applies to employment discrimination in programs with that objective, it should remand this case to the Court of Appeals for consideration of whether such programs were involved in this case.

program or activity receiving federal financial assistance ...." Although the terms of these prohibitions are similar, Titles VI and IX contain enforcement restrictions which are not found in section 504. See 20 U.S.C. § 1682, 45 U.S.C. § 2000d-1.

In North Haven Board of Education v. Bell, this Court, while noting the program-specific nature of Title IX, did not attempt to define "program." 456 U.S. at 540. We do not here attempt to offer a comprehensive explication of the "program or activity" language of section 504. The experience of the lower courts in applying section 504, Title VI and Title IX demonstrates that federal funds benefit individuals, and discrimination may injure them, in a wide and complex variety of ways and circumstances. We believe this Court should not attempt to define in a single

opinion the legal status of each of these situations, and urge instead that the explication of the "program or activity" language proceed on a case by case basis.

Petitioner Conrail was established pursuant to the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 701 et seq. In light of the bankruptcy of eight major railroads, and the possibility of termination of the rail service which they provided, Congress directed the reorganization of the railroads into a single system operated by a federally chartered corporation. Regional Rail Reorganization Act Cases, 419 U.S. 102, 108-117 (1974). Because of the financial condition of the railroads to be merged into this system, Congress recognized that a substantial infusion of federal funds would be required. Under section 216 of the act, Conrail has received $3.28 billion which may be used

for the modernization of rail properties, for the acquisition of equipment, for the refinancing of indebtedness, or as working capital. 45 U.S.C. § 726(b)(1). Under Title V of the act, 45 U.S.C. § 797 et seq., Conrail has received $317.8 million in federal aid to assist workers adversely affected by the consolidation of the rail lines. Title V funds can be utilized by Conrail to retrain or move workers, and to pay allowances to unemployed or terminated employees. The total amount received by Conrail under the Rail Act, over three and one half billion dollars, exceeds the sum of all federal aid received by many states and most cities in recent years.

We maintain that Conrail's refusal to employ LeStrange meets section 504's "program or activity" requirement for several distinct reasons. First, we urge that the

term "program" includes all the activities for which the recipient seeks and actually obtains federal funds to engage in, regardless of whether some portion of those activities may in fact be paid for with non-federal funds. Section 27.9(a) of the DOT regulations requires:

> Each application for Federal financial assistance to carry out a program ... shall, as a condition to approval... be accompanied by, written assurance that the program will be conducted ... in compliance with all the requirements imposed by ... this part. 49 C.F.R. § 27.9(a) (emphasis added).

The earlier HEW section 504 and Title VI regulations are similar. 45 C.F.R. §§ 80.4(a)(1), 85.5(a). The scope of protection afforded by this assurance extends to the entire program of activities for which federal funds are to be provided, without regard to whether other funds may also be utilized in that program.

Any or all of the $3.28 billion in section 216 funds obtained by Conrail

could have been used as working capital to meet ordinary business expenses such as wages; $631 million was actually applied for such purposes. A-17. The employment of engineers such as LeStrange was thus clearly among the functions for which federal assistance was sought by and given to Conrail. Petitioner, however, suggests that section 504 requires proof that "the position for which LeStrange applied was funded with federal money...."[75/] But neither the applicable regulations nor the statutory language support such a narrow construction of section 504; that provision is "program-specific" not "job-specific." If petitioner is correct, section 504 would apply only to those employees whom the recipient chose to pay

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75/ Brief for Petitioner, p. 25; see also Id. at 26.

with federal funds. Were that the case, Conrail's accountants, not federal law, would determine who was protected by section 504 and Conrail could evade completely the commands of section 504 merely by using non-federal funds for any job slot from which it intended to exclude a handicapped worker.[76/] Only by reading section 504, as do the DOT and earlier HEW regulations, to cover all activities for which the federal assistance could be used can

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76/ Such a construction of the law "would allow major institutions receiving substantial amounts of federal aid to dissect themselves, at whim, into discrete entities, to allocate federal dollars into programs which cannot discriminate against handicapped persons, and to free privately obtained funds from those programs and instead to channel such money into programs purportedly immune from Section 504 strictures." Wright v. Columbia University, 520 F. Supp. 789, 792 (E.D. Pa. 1981.) See also United States v. City of Chicago, 549 F.2d 415, 442 (7th Cir. 1977); Haffer v. Temple University 524 F.Supp. 531 (E.D. Pa. 1981), aff'd 688 F.2d 14 (3d Cir. 1982).

such evasion be prevented.

Second, even if federal funds had not been available to pay LeStrange, he still would have been protected by section 504 because of Conrail's use of federal funds to purchase equipment and to construct or improve its track system. Where federal funds are employed to acquire or improve real or personal property, the nondiscrimination requirement applies to the utilization of that property so long as it continues to be "used for the purpose for which the Federal financial assistance was provided or for a similar purpose." 49 C.F.R. §§ 27.9(b)(1) and (b)(2). In the instant case Conrail spent over $2.7 billion in federal funds to rehabilitate almost all of its high-density main line track system, to rebuild or convert locomotives or other equipment, and for additions and improvements in rail yards and

other physical plants. A-17. It is inconceivable that none of this vast expenditure at any time affected the jobs on which LeStrange would have worked, and Conrail does not claim that this occurred.

In addition, section 27.7(b)(6) of the DOT regulations provides:

> [T]he aid, benefit, or service provided under a program or activity receiving or benefitting from federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented ... in whole or in part, with federal assistance. (Emphasis added.)

This regulation has its roots in Simkins v. Moses H. Cone Memorial Hospital,[77/] which served as a model for Title VI, and which held all the activities of a nominally private hospital were "state action" because part of the hospital building had been

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77/ 323 F.2d 959 (4th Cir. 1963) (en banc), cert. denied 376 U.S. 938 (1964).

constructed with federal funds.[78/] Conrail's system of yards and contiguous track and road bed constitutes a single facility within the meaning of the regulations. See 49 C.F.R. § 27.5. Thus even if the tracks and buildings which LeStrange would personally have used were not built or renovated with federal funds, the use of federal aid for that purpose elsewhere in the system renders section 504 applicable throughout.

Third, the benefit of federal assistance may extend beyond the immediate activity for which the funds are expended if they in fact replace funds which the recipient is thus free to spend on other activities. Often, of course, the federal aid will be used for a program which would not have been operated but for that assistance, or be applied to increase the size

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78/ See 323 F.2d at 971 (Haynsworth, J., dissenting.)

or scope of some pre-existing function. In such cases there would be no non-federal funds released for other purposes. But where a plaintiff can show that one of the benefits of federal assistance was to displace other funds which the recipient was able to use elsewhere, and that the amount of the funds thus released for general purposes was not de minimis, the benefit of the federal assistance includes the equivalent of an unrestricted grant in the amount of the released funds, and extends to any activities for which they could have been spent.[79/] Ordinarily ascertaining whether such funds had thus been released for general use would involve

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79/ See Haffer v. Temple University 524 F.Supp. 531, 537 (E.D. Pa. 1981) aff'd 688 F.2d 14 (3d Cir. 1982); Poole v. South Plainfield Board of Education, 490 F.Supp. 948, 951 (D.N.J. 1980); Bob Jones University v. Johnson, 396 F.Supp. 597, 602-03 (D.S.C. 1974), aff'd sub nom. Bob Jones University v. Rhodebush, 529 F.2d 514 (4th Cir. 1975).

factual issues to be resolved in the first instance by the trial court. In this case, however, such an evidentiary inquiry is not necessary. The $317 million in Title V funds was specifically intended to relieve Conrail of its contractual obligations under collective bargaining agreements in existence in 1973 to provide severance pay or other benefits to employees who lost their jobs. Section 504(a) expressly superseded all job stabilization provisions in those agreements, 87 Stat. 1014, and the severance pay formula contained in section 505(f) was based on the formula that would have applied under the agreements. S. Rep. No. 93-601, 93rd Cong., 1st Sess., 48 (1973). Thus the very purpose of Title V was to help meet Conrail's preexisting financial obligations to its employees, and as a consequence to release for other uses

the funds which would otherwise have been expended to meet those obligations.

CONCLUSION

For the above reasons the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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STATUTORY APPENDIX

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Section 505 of the Rehabilitation Act, 29 U.S.C. § 794a, provides:

> (a)(1) The remedies, procedures, and rights set forth in section 717

of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k) shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 601 of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, provides:

No person in the United States shall, on the ground of race, color, participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 604 of the 1964 Civil Rights Act, 42 U.S.C. § 2000d-3, provides:

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

49 C.F.R. § 27.7(b)(4) provides:

A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration: (i) That have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially reducing the likelihood that handicapped persons can benefit by the objectives of the recipient's program, or (iii) that yield or perpetuate discrimination against another recipient if both recipients are subject to common administrative

control or are agencies of the same State.

49 C.F.R. § 27.9 provides:

(a) General. Each application for Federal financial assistance to carry out a program to which this part applies, and each application to provide a facility, shall, as a condition to ap proval or extension of any Federal financial assistance pursuant to the application, contain, or be accompanied by, written assurance that the program will be conducted or the facility operated in compliance with all the requirements imposed by or pursuant to this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) Future Effect of Assurances. Recipients of Federal financial assistance, and transferees of property obtained by a recipient with the partici pation of Federal financial assistance, are bound by the recipient's assurance under the following circumstances:

(1) When Federal financial assistance is provided in the form of a conveyance of real property or an interest in real property from the Department of Transportation to a recipient, the instrument of conveyance shall include a convenant

running with the land binding the recipient and subsequent transferees to comply with the requirements of this part for so long as the property is used for the purpose for which the Federal financial assistance was provided or for a similar purpose.

(2) When Federal financial assistance is used by a recipient to purchase or improve real property, the assurance provided by the recipient shall obligate the recipient to comply with the requirements of this part and require any subsequent transferee of the property, who is using the property for the purpose for which the Federal financial assistance was provided, to agree in writing to comply with the requirements of this part. The obligations of the recipient and transferees under this part shall continue in effect for as long as the property is used for the purpose for which Federal financial assistance was provided or for a similar purpose.

(3) When Federal financial assistance is provided to the recipient in the form of, or is used by the recipient to obtain, personal property, the assurance provided by the recipient shall obligate the recipient to comply with the requirements

of this part for the period it retains ownership of possession of the property or the property is used by a transferee for purposes directly elated to the operations of the recipient.

(4) When Federal financial assistance is used by a recipient for purposes other than to obtain property, the assurance provided shall obligate the recipient to comply with the requirements of this part for the period during which the Federal financial assistance is extended to the program.

49 C.F.R. § 27.11(c)(2) provides:

A recipient shall, within 180 days from the effective date of this part, after consultation at each step in paragraphs (c)(2) (i)-(iii) of this section with interested persons, including handicapped persons and organizations representing the handicapped:

(i) Evaluate its current policies and practices for implementing these regulations, and notify the head of the operating administration of the completion of this evaluation;

(ii) Identify shortcomings in compliance and describe the methods used to remedy them;

(iii) Begin to modify, with official approval of recipient's management, any policies or practices that do not meet the requirements of this part according to a schedule or sequence that includes milestones or measures of achieve ment. These modifications shall be completed within one year from the effective date of this part;

(iv) Take appropriate remedial steps to eliminate the effects of any discrimination that resulted from previous policies and practices; and

(v) Establish a system for periodically reviewing and updating the evaluation.

49 C.F.R. § 27.31(a)(1) provides:

No qualified handicapped applicant for employment, or an employee shall, on the basis of handicap be subjected to discrimination in employment under any program or activity that receives or benefits from Federal financial assistance.